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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

MOISES GOMEZ,

Defendant-Appellant.

No. 40664

Bannock Co. Case No.
CR-2011-20165

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BANNOCK**

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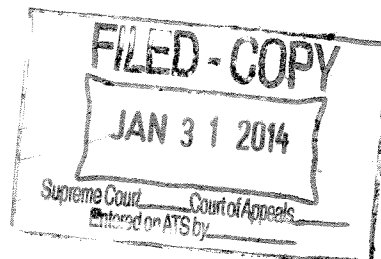


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STATEMENT OF THE CASE

Nature of the Case

Moises Gomez appeals from the judgment and sentence entered upon his guilty plea to sexual abuse of a minor child. On appeal, Gomez argues the district court abused its discretion by denying his post-sentencing motion for withdrawal of his guilty plea. He also argues the district court abused its sentencing discretion.

Statement of Facts and Course of Proceedings

In 1999, then 26-year-old Gomez sexually abused a close family friend, 14-year-old S.B., while S.B. and her family were attending a family reunion at Lava Hot Springs. (PSI, pp.2-3.) Gomez escorted S.B. to her room and, once there, told S.B. he was going to give her a massage. (PSI, p.3.) At Gomez's direction, S.B. lay on the bed and Gomez massaged her neck and back. (PSI, p.3.) "After a short time, [Gomez] instructed [S.B.] to turn over on her back and lay with her legs slightly apart." (PSI, p.3.) As Gomez continued massaging S.B., he lifted up her shirt and sports bra, "plac[ed] his hands firmly around each" of her exposed breasts, and rubbed them in a circular motion for several minutes. (PSI, p.3.) Gomez then worked his way down S.B.'s torso, placed his hands under her pajama bottoms and massaged her thighs and "the outer area of her vagina." (PSI, p.3.) Gomez "continued massaging [S.B.'s] vaginal area[,] using larger strokes around the labia minora, labia majora and clitoris." (PSI, p.3.) S.B. "was frightened to the point she couldn't tell [Gomez] to stop, but when he massaged her vaginal area continuously, she found the courage to tell

him she felt uncomfortable with his massaging.” (PSI, p.3.) “At that point, [Gomez] removed his hand from her underwear and replied, ‘just once more,’ then placed his hands back inside her underwear and continued stroking her vaginal area with his hand.” (PSI, p.3.) He stopped when his infant son began crying in the next room. (PSI, p.3.) The next day, Gomez approached S.B. from behind, “wrapped his arms around her torso, squeezing her to his body,” and “whispered to her that he was sorry.” (PSI, p.3.)

For years, S.B. did not tell anyone what Gomez had done to her. In July 2011, Gomez contacted S.B. and told her “he had confided with his LDS Stake President about what he did to her at Lava Hot Springs” and, as a result, was “disfellowshipped from the church.” (PSI, pp.3-4.) Following that contact, S.B. reported the abuse to law enforcement. (PSI, pp.2-4.) During a “slam call,” Gomez repeatedly admitted to having touched S.B.’s breast while giving her a massage when she was 14 years old, but he denied any memory of having touched her vagina. (PSI, p.4; Psych. Eval., p.2.)

The state charged Gomez with one count of sexual abuse of a child under the age of 16 years and one count of lewd conduct with a child under 16. (R., pp.17-18.) Pursuant to a plea agreement, Gomez pled guilty to sexual abuse of a minor under the age of 16 years; in exchange, the state stipulated to the dismissal of the lewd conduct charge and, contingent on a finding by the psychosexual evaluator that Gomez posed a low risk to reoffend, agreed to recommend that Gomez be placed on probation. (R., pp.39-48, 50-52.)

In October 2012, the psychosexual evaluator submitted a report in which he opined that, at a minimum, Gomez posed a “moderate-low risk” of sexually reoffending. (Psych. Eval., p.13 (emphasis original).) The evaluator also stated that, due to Gomez’s inability to produce a nondeceptive full disclosure polygraph examination, “I am not recommending community placement for Mr. Gomez.” (Psych. Eval., p.14.) The presentence investigator concurred with the evaluator’s conclusions and recommended a period of retained jurisdiction. (PSI, p.13.) The presentence investigator also noted that Gomez was “not a legal resident and [would] be subject to removal proceedings upon completion of his sentence in this matter.” (PSI, p.13.)

After the presentence report and psychosexual evaluation were prepared, but before sentencing, Gomez filed a motion to withdraw his guilty plea. (R., pp.58-61.) Gomez subsequently withdrew the motion, and the case proceeded to sentencing. (R., pp.64-71.) The district court imposed a unified sentence of eight years, with three years fixed, and retained jurisdiction. (R., pp.66-71.)

Before the period of retained jurisdiction expired, Gomez filed a second motion to withdraw his guilty plea. (Augmentation: 6/12/13 Motion To Withdraw Plea of Guilty (“Motion”).) As the basis for his motion, Gomez asserted, for the first time, that at the time of his plea colloquy, he “spoke only limited English” and “did not understand and was not properly informed of the immigration consequence of his plea.” (Motion, p.2; see also Augmentation: 7/16/13 Affidavit.) Also for the first time, Gomez requested the assistance of an interpreter (Augmentation: 7/9/13 Motion To Appoint Interpreter) – a request the

district court granted (Augmentation: 7/15/13 Minute Entry & Order; 7/15/13 Tr., pp.1-4).

At a rider review hearing on July 22, 2013, the district court suspended the balance of Gomez's sentence and placed him on probation. (Augmentation: 7/29/13 Minute Entry & Order; 7/22/13 Tr., p.5, L.3 – p.6, L.20.) The court also heard argument on Gomez's post-sentencing motion to withdraw his guilty plea. (7/22/13 Tr., p.6, L.21 – p.14, L.3.) The court ultimately denied the motion, finding no manifest injustice because the record showed Gomez understood English and was told multiple times that he might be deported as a result of his plea. (Augmentation: 8/6/13 Decision On Motion To Set Aside Guilty Plea (attached hereto as Appendix A).)

Gomez filed a notice of appeal, timely from both the original judgment and the order denying his motion to withdraw his guilty plea. (R., pp.74-78.)

ISSUES

Gomez states the issues on appeal as:

1. Did the district court err in denying Mr. Gomez's Motion to Withdraw Guilty Plea?
2. Did the district court abuse its discretion when it imposed a sentence of eight years, with three years fixed, upon Mr. Gomez following his plea of guilty?

(Appellant's brief, p.5.)

The state rephrases the issues as:

1. Has Gomez failed to show the district court abused its discretion by denying his post-sentencing motion to withdraw his guilty plea because Gomez failed to carry his burden of demonstrating manifest injustice entitling him to withdrawal of his plea?
2. Has Gomez failed to show the district court abused its discretion by imposing a unified sentence of eight years, with three years fixed, upon his guilty plea to sexual abuse of a minor child?

ARGUMENT

I.

Gomez Has Failed To Show The District Court Abused Its Discretion In Denying His Post-Sentencing Motion To Withdraw His Guilty Plea

A. Introduction

After he was sentenced, Gomez moved to withdraw his plea on the sole asserted bases that, at the time of the plea colloquy, he did not understand English and was neither informed nor aware that he could be deported as a result of his plea. (Motion, p.2.) The district court denied the motion, finding from its review of the record that Gomez both understood English and was aware of the potential immigration consequences of his plea. (8/6/13 Decision On Motion To Set Aside Guilty Plea.)

On appeal, Gomez is “[m]indful of the fact that [he] stated on the record that he read and understood English, and responded ‘yes’ to this question in writing on the guilty plea questionnaire.” (Appellant’s brief, p.6; see also Appellant’s brief, p.11.) He is also “mindful of the fact that both his counsel and the district court advised [him] that he could possibly be deported.” (Id.) Nevertheless, Gomez continues to assert “that he did not understand the legal proceedings and did not understand that he could be deported if he pled guilty.” (Id.) Gomez’s arguments fail. The district court correctly concluded that Gomez’s claims are refuted by the record and, as such, Gomez failed to carry his burden of demonstrating any manifest injustice entitling him to post-sentencing withdrawal of his guilty plea.

B. Standard Of Review

“Appellate review of the denial of a motion to withdraw a plea is limited to whether the district court exercised sound judicial discretion as distinguished from arbitrary action.” State v. Hanslovan, 147 Idaho 530, 535-536, 211 P.3d 775, 780-781 (Ct. App. 2008) (citing State v. McFarland, 130 Idaho 358, 362, 941 P.2d 330, 334 (Ct. App. 1997)). An appellate court will defer to the trial court's factual findings if they are supported by substantial competent evidence. State v. Holland, 135 Idaho 159, 15 P.3d 1167 (2000); Gabourie v. State, 125 Idaho 254, 869 P.2d 571 (Ct. App. 1994).

C. The District Court Correctly Concluded Gomez Failed To Show Any Manifest Injustice Entitling Him To Withdrawal Of His Guilty Plea

Generally, a motion for withdrawal of a guilty plea will not be granted after sentencing. State v. Carrasco, 117 Idaho 295, 298, 787 P.2d 281, 284 (1990); Hoover v. State, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988). A court may permit a defendant to withdraw his guilty plea after sentencing only upon a satisfactory showing by the defendant that withdrawal of the guilty plea is necessary to correct a “manifest injustice.” I.C.R. 33(c); State v. Flowers, 150 Idaho 568, 571, 249 P.3d 367, 370 (2011); State v. Heredia, 144 Idaho 95, 97, 156 P.3d 1193, 1195 (2007).

The strictness of the standard is justified by the legal weight of the guilty plea. “A plea of guilty has the same force and effect as a judgment rendered after a full trial on the merits.” Schmidt v. State, 103 Idaho 340, 346, 647 P.2d 796, 802 (Ct. App. 1982). The stricter standard also insures that the defendant

is not “encouraged to plead guilty to test the weight of potential punishment and withdraw the plea if the sentence is unexpectedly severe.” State v. Stone, 147 Idaho 330, 333, 208 P.3d 734, 737 (Ct. App. 2009). The defendant has the burden of proving that the plea should be withdrawn. Id.; State v. Gomez, 124 Idaho 177, 178, 857 P.2d 656, 657 (Ct. App. 1993).

Manifest injustice is established as a matter of law where a plea is “not taken in compliance with constitutional due process standards.” State v. Thomas, 154 Idaho 305, 307, 297 P.3d 268, 270 (Ct. App. 2013); see also Heredia, 144 Idaho at 97, 156 P.3d at 1195. Constitutional due process standards require “that a guilty plea be made voluntarily, knowingly and intelligently,” as shown by the “record of the entire proceedings, including reasonable inferences drawn therefrom.” Thomas, 154 Idaho at 307, 297 P.3d at 270 (citing I.C.R. 11(c)); accord Flowers, 150 Idaho at 572, 249 P.3d at 371.

In Idaho, the trial court must follow the minimum requirements of I.C.R. 11(c) in accepting guilty pleas. State v. Mauro, 121 Idaho 178, 180, 824 P.2d 109, 111 (1991) (quoting State v. Detweiler, 115 Idaho 443, 446, 767 P.2d 286, 289 (Ct. App. 1989)). If the record indicates that the trial court followed the requirements of I.C.R. 11(c), this is a prima facie showing that the plea is voluntary and knowing. Mauro, 121 Idaho at 180, 824 P.2d at 111. However, “[t]he failure to comply with Idaho Criminal Rule 11 does not, by itself, constitute manifest injustice.” Flowers, 150 Idaho at 573, 249 P.3d at 372. As a matter of constitutional due process, a plea is knowing and voluntary if it is “entered by one fully aware of the direct consequences, including the actual value of any

commitments made to him by the court, prosecutor, or his own counsel.” Brady v. United States, 397 U.S. 742, 755 (1970). Because due process requires only that a defendant be advised of the direct consequences of a guilty plea, the trial court is not constitutionally required to inform a defendant of consequences that are collateral or indirect. Flowers, 150 Idaho at 573, 249 P.3d at 372 (“Prior to accepting a guilty plea, a court is only required to inform the defendant of the direct consequences of the plea.”); Jakoski v. State, 136 Idaho 280, 32 P.3d 672 (Ct. App. 2001) (citation omitted) (“[D]ue process only requires that a defendant be informed of direct, as opposed to collateral consequences of a guilty plea.”); see also Heredia, 144 Idaho at 97-98, 156 P.3d at 1195-96 (citing State v. Huffman, 137 Idaho 886, 887, 55 P.3d 879, 880 (Ct. App. 2002); Ray v. State, 133 Idaho 96, 99-101, 982 P.2d 931, 934-36 (1999)) (under I.C.R. 11(c), which establishes the minimum requirements for taking a constitutionally valid guilty plea, “[t]he trial court is not required to inform a defendant of consequences that are collateral or indirect”).

In this case, Gomez moved to withdraw his plea based on his claims that, at the time he entered the plea, he did not understand English and was neither properly advised nor aware that he could be deported as a result of his plea. (Motion; 7/16/13 Affidavit; 7/22/13 Tr., p.6, L.25 – p.9, L.14, p.10, L.18 – p.12, L.20.) Whether the risk of deportation is a direct or collateral consequence of a guilty plea is a matter of some debate. Compare Padilla v. Kentucky, 559 U.S. 356, 367 (2010) (United States Supreme Court expressed its view, in the context of resolving a Sixth Amendment ineffective assistance of counsel claim, that

“[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence” of a guilty plea), with Steele v. State, 153 Idaho 783, 291 P.3d 466 (Ct. App. 2012) (indicating that, for purposes of a due process analysis, the risk of deportation is a collateral consequence of a guilty plea, albeit one counsel is required to inform his client of in order to provide the professional assistance demanded by the Sixth Amendment); see also I.C.R. 11(d)(1) (before accepting plea, court “shall inform all defendants that if the defendant is not a citizen of the United States, the entry of a plea or making of factual admissions could have consequences of deportation or removal ...”). This Court need not resolve the debate in this case, however, because even assuming, *arguendo*, that the risk of deportation is a direct consequence of which Gomez was required to be advised, the record in this case supports the district court’s determination that Gomez was so advised and that he actually understood he could be deported as a consequence of his plea.

In its order denying Gomez’s motion to withdraw his guilty plea, the district court applied the correct legal standards and set forth in detail the facts, drawn from the record, that demonstrate Gomez understands English and entered his plea knowingly, voluntarily and intelligently and with knowledge of the consequences thereof, including the potential immigration consequences. Rather than repeat the district court’s factual findings and legal conclusions, the state hereby adopts the district court’s analysis, as set forth at pages 4 through 7

of the court's "Decision on Motion to Set Aside Guilty Plea"¹ (see Appendix A), and submits for the reasons recited therein that Gomez failed to establish any manifest injustice entitling him to withdraw his plea.

II.

Gomez Has Failed To Show The District Court Abused Its Sentencing Discretion

A. Introduction

Gomez challenges the underlying unified sentence of eight years, with three years fixed, imposed upon his guilty plea to sexual abuse of a minor child. Specifically, he contends the sentence is excessive in light of the mitigating factors he claims are present in this case. (Appellant's brief, pp.12-15.) A review of the record and the applicable law supports the sentence imposed. Gomez has failed to establish an abuse of discretion.

¹ The state does note that, in resolving whether Gomez was adequately informed of the risk of deportation, the district court erroneously stated that Gomez "pled guilty to sexual battery of a minor child sixteen or seventeen years of age under I.C. § 18-1508A(1)(a)." (Appendix A, pp.7-8.) In actuality, the record shows Gomez pled guilty to sexual abuse of a minor child under 16 years old. (R., pp.39-48; 7/23/12 Tr., p.2, L.7 – p.9, L.25.) The district court found the distinction "important" because sexual abuse of a minor child under 16 is an aggravated felony for which deportation is "presumptively automatic." (Appendix A, p.8.) The state disagrees with the district court's assessment and asserts the distinction is actually unimportant, at least in the due process context, because the record shows Gomez was advised multiple times that he might be deported and knew before he was sentenced that he was actually facing deportation due to his status as an illegal alien. (See R., p.47; 7/23/12 Tr., p.7, L.20 – p.8, L.9; 12/3/12 Tr., p.16, L.19 – p.18, L.5; PSI, pp.9, 12-13; Appendix A, pp.5-8.) Whether Gomez's attorney had an obligation under the Sixth Amendment to provide him more comprehensive advice about the deportation consequences of his plea is a question not at issue in this appeal. (See Appellant's brief, p.1 n.2.)

B. Standard Of Review

When a sentence is within statutory limits, the appellate court will review only for an abuse of discretion. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). The appellant bears the burden of demonstrating that the sentencing court abused its discretion. Id.

C. Gomez Has Failed To Show His Sentence Is Excessive Under Any Reasonable View Of The Facts

Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The nature of Gomez's crime and his character shows there was no abuse of sentencing discretion. Gomez molested a 14-year-old girl whose family apparently entrusted her to Gomez's care during a trip to Lava Hot Springs. (PSI, pp.2-4.) The girl, S.B., was staying with Gomez and his wife and son in their cottage while the rest of S.B.'s family stayed in the "main house." (PSI, p.3.) On the first night of S.B.'s stay, Gomez escorted her to a bedroom and "massaged" her breasts and vaginal area underneath her clothes. (PSI, pp.3-4.) When S.B. told Gomez "she felt uncomfortable with his massaging" Gomez

“removed his hand from her underwear and replied, ‘just once more,’ then placed his hands back inside her underwear and continued stroking her vaginal area with his hand.” (PSI, p.3.) Gomez stopped “massaging” S.B.’s vaginal area when his son began crying in the next room, but he suggested to S.B. that she and he “should share the bed when he returned.” (PSI, p.3.) When Gomez left the room, S.B. laid on the floor and pretended to be asleep. (PSI, p.3.) The next morning, Gomez woke S.B. up and told her to sleep in the bed. (PSI, p.3.) Later that evening, Gomez embraced S.B. from behind and “whispered to her that he was sorry.” (PSI, p.3.)

After Gomez sexually abused her, S.B. was afraid to tell anyone what had happened. (PSI, pp.4-6.) In the years that followed, and in an effort to keep up pretenses, S.B. continued to visit Gomez and his family, sometimes staying with them for up to a week at a time. (PSI, p.5.) During those visits, Gomez “would often say things or do things to make [S.B.] feel uncomfortable,” including touching her and massaging her shoulders. (PSI, p.5.) He often told S.B. she was “his favorite” and that her skin was pretty and, occasionally, he told S.B. that if he had met her before he met his wife, he would have married S.B. instead. (PSI, p.5.) On the nights S.B. slept at Gomez’s house, Gomez “would always find a reason” to go to the basement where S.B. was sleeping and talk to her; and “each night [S.B.] was afraid it [the sexual abuse] would happen again.” (PSI, p.5.) As a result of having been abused by Gomez, S.B. has for years suffered from depression and experienced ongoing intimacy and trust issues that have adversely affected her relationships. (PSI, pp.4-6.)

Twelve years after he sexually abused her, Gomez contacted S.B. and told her “he had confided with his LDS Stake President about what he did to her at Lava Hot Springs. [He] also told her he was disfellowshipped from the church and had ‘paid’ his consequences.” (PSI, pp.3-4.) Gomez apparently actually believed he had already suffered any consequences that were due as a result of having sexually abused S.B., as he repeated that sentiment in a recorded telephone conversation with S.B. in September 2011. (PSI, p.4.) During that call Gomez repeatedly admitted to having massaged S.B.’s exposed breasts when she was 14 years old, but he denied any recollection of having touched her vagina. (PSI, p.4.)

Consistent with his statements to S.B. in the September 2011 “slam call,” Gomez responses to questioning and testing by the psychosexual evaluator showed he “minimize[d] the seriousness of what occurred.” (Psych. Eval., pp.2, 6.) According to the evaluator, Gomez believed “the allegations against him [had] been exaggerated and state[d] that he did not know that what he did was all that wrong. (Psych. Eval., p.5.) He blamed others – including his spouse and parents – for his sexual offending, and he specifically blamed S.B. for his behavior in this case, “indicating that she appeared and acted older than her actual age, was ‘loose’ or easy, and that she wanted and liked the sexual activity that occurred.” (Psych. Eval., p.6.) When asked by the polygrapher “what his intentions were on the night of the index crime,” Gomez admitted he found S.B. “very attractive and it was his plan to see if things would develop to the point of intercourse, stating, ‘I guess in the end, if fell [sic] into place, I hoped to have

sex.” (Psych. Eval., p.7.) Despite this admission, Gomez continued to maintain, in two separate polygraph examinations, that he did not recall ever touching S.B.’s vagina and never masturbated to sexual thoughts or fantasies of S.B. (Psych. Eval., p.10.) Gomez showed deception on both polygraphs, however, leading the psychosexual evaluator to conclude “[t]here is thus more to know about Mr. Gomez’s actions vis-à-vis the index victim [S.B.]” (Psych. Eval., pp.10-11.)

Although Gomez denied having perpetrated sexual abuse on any other child, testing showed that, “by far, his strongest sexual interests are for well-developed adolescent females, with much less – but still significant – sexual interest in adult females.” (Psych. Eval, pp.6, 8.) This result is, at the very least, concerning because, at the time of the psychosexual evaluation, Gomez had been coaching a “girls’ volleyball team, made up of older preteen and young teen females.” (Psych. Eval., p.11.) He admitted “to having had sexual thoughts about two of the girls ... and having experienced brief masturbation fantasies about several of the girls, denying any ejaculation to these fantasies.” (Psych. Eval., p.11.) As noted by the psychosexual evaluator, however, at the time of the evaluation Gomez had “yet to produce a nondeceptive polygraph record, leaving open the possibilities of direct abuse or simply fantasy and masturbation at a greater level than Mr. Gomez has thus far been willing to disclose.” (Psych. Eval., p.11.)

In the absence of a nondeceptive polygraph, the psychosexual evaluator was unable to definitively assess the risk Gomez poses to sexually reoffend.

(Psych. Eval., pp.11, 13.) Relying on other risk assessment tools available to him, the evaluator opined that, at a minimum, Gomez “poses a moderate-low risk for sexual offending and for more general criminal recidivism in the future.” (Psych. Eval., p.13 (emphasis original).) Ultimately, however, the evaluator noted that Gomez’s “risk level remains **indeterminate**,” and he recommended that Gomez not be placed in the community. (Psych. Eval., pp.13-14 (emphasis original).)

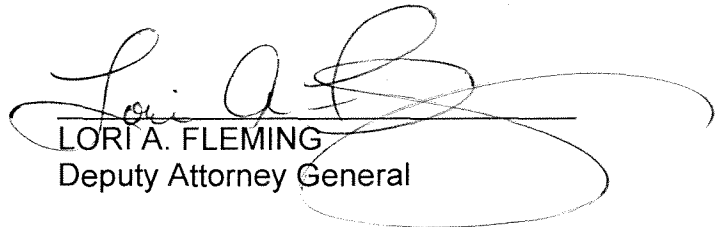
In fashioning an appropriate sentence, the district court considered the information and recommendations contained in the presentence report and psychological evaluation, as well as the four goals of sentencing. (12/3/12 Tr., p.22, Ls.12-16.) It also considered Gomez’s request that he be placed on probation but declined to grant that request for two reasons. (12/3/12 Tr., p.22, Ls.13-14, 17-18.) First, the court was unwilling to send the message “that if you’re in the country illegally and you commit a felony, all you have to do is get deported and there’s no other punishment to the crime.” (12/3/12 Tr., p.22, Ls.18-22.) Second, and perhaps more importantly, the court accurately observed that Gomez’s polygraph results indicated “there is some deception still regarding the nature of this case and what he did in this particular circumstance.” (12/3/12 Tr., p.22, L.23 – p.23, L.2.) The court thus imposed a unified sentence of eight years, with three years fixed, and retained jurisdiction for the purpose of requiring Gomez to obtain sex offender treatment before he could be deported. (12/3/12 Tr., p.23, Ls.3-10.)

On appeal, Gomez does not contest any of the information upon which the district court relied in crafting his underlying sentence. Instead, he claims only that the court should have given greater weight to factors he deems mitigating, including his family support, employment history and purported remorse and acceptance of responsibility. (Appellant's brief, pp.12-15.) There can be no question that the district court was aware of these "mitigating factors" when it imposed Gomez's sentence. That the court did not assign these factors greater weight or elevate them above the need to protect society while at the same time providing Gomez an opportunity for structured rehabilitation does not show the sentence is excessive. Assuming Gomez is not deported, his underlying sentence of eight years, with three years fixed, is more than reasonable given the nature of his crime and his continued minimization of it. Gomez has failed to show an abuse of sentencing discretion.

CONCLUSION

The state respectfully requests that this Court affirm the judgment and sentence and the district court's order denying Gomez's motion to withdraw his guilty plea.

DATED this 31st day of January 2014.

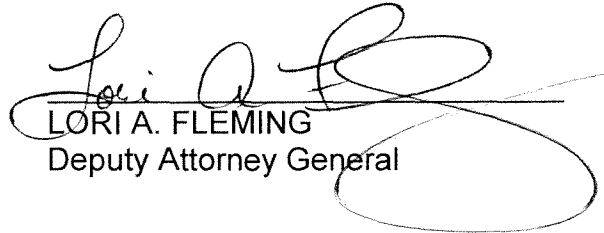

LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 31st day of January 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.


LORI A. FLEMING
Deputy Attorney General

LAF/pm

Appendix A

STATE OF IDAHO } ss.
County of Bannock

I hereby certify that the foregoing is a full, true and correct copy of an instrument as the same now remains on file and of record in my office.
WITNESS my hand and official seal hereto affixed

this 21 day of August 2013
DALE HATCH, CLERK OF THE DISTRICT COURT,
EX OFFICIO AUDITOR AND RECORDER

BY DALE HATCH IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

STATE OF IDAHO,

Plaintiff,

vs.

MOISES GOMEZ,

Defendant.

FILED
BANNOCK COUNTY
CLERK OF THE COURT

2013 AUG -6 PM 4:09

DEPUTY CLERK

Case No: CR-2011-0020165-FE

DECISION ON MOTION TO SET
ASIDE GUILTY PLEA

The Court sentenced Defendant Moises Gomez on December 3, 2012, on 1 count of Sexual Battery of a Minor Child Sixteen or Seventeen Years of Age, in violation of I.C. § 18-1508A(1)(a). The sentence is for a term of eight years with three years fixed followed by five years indeterminate. The Court retained jurisdiction for 365 days and sent Gomez on a retained jurisdiction program. IDOC placed Gomez in the Sex Offender Retained Jurisdiction Program. Gomez did well on the retained jurisdiction program and this Court placed him on probation on July 22, 2013. However, the U.S. Bureau of Immigration and Customs Enforcement (ICE) lodged a detainer against Gomez and he is subject to deportation. The detainer resulted in a hold against Gomez and he is still sitting in the Bannock County Jail awaiting seizure by ICE.

This matter came before the Court on Defendant's Motion to Set Aside Guilty Plea.

The Court held a hearing on July 22, 2013. Doug Dykman appeared for and with the Defendant Moises Gomez. Zachery Parris, Bannock County Chief Deputy Prosecuting Attorney appeared for the State of Idaho. The Court heard oral argument and then took the matter under advisement. Now, the Court issues this decision.

BACKGROUND

On January 12, 2012, the State filed a Prosecuting Attorney's Information charging Defendant Moises Gomez with 1 Count Sexual Abuse of a Child under the Age of Sixteen Years in violation of I.C. §18-1508(1)(b) and 1 Count Lewd Conduct with a Child under Sixteen in violation of I.C. § 18-1508. On July 23, 2012, Gomez pled guilty to 1 Count Sexual Battery of a Minor Child Sixteen or Seventeen Years of Age in violation of I.C. § 18-1508A(1)(A). The State dismissed the 2nd count. The Court set sentencing for September 4, 2012. The parties twice stipulated to continue sentencing to allow time for the necessary evaluations to be completed, particularly a psychosexual evaluation with a full disclosure polygraph.

Originally, private counsel represented Gomez. That counsel withdrew his representation in writing on October 16, 2012, and the Court appointed a public defender to represent Gomez. The Court set sentencing for November 5, 2012. The public defender filed a Motion to Withdraw Guilty Plea on November 5, 2012.¹ The PSI Report was completed on October 29, 2012, and submitted to the Court, prosecutor, and private counsel on that date. However, the public defender claimed neither he nor his client had seen the PSI as of November 5, 2012, which was the date for sentencing. The Court

¹ This motion gave no grounds for the motion other than it was being done pursuant to I.C. § 19-1714 and ICR 33.

continued the sentencing and set the sentencing and Motion to Withdraw Guilty Plea for hearing on November 13, 2012. On November 13, 2012, Defense counsel asked for another continuance and the Court continued the matter.²

On November 26, 2012, the defendant, in open court, withdrew his Motion to Set Aside Guilty Plea and asked to proceed with sentencing at a later date. The Court set sentencing for December 3, 2012. A sentencing hearing occurred on December 3, 2012, and the Court sentenced Gomez to three years fixed followed by five years indeterminate and retained jurisdiction for 365 days. Gomez appealed his sentence, particularly the order for retained jurisdiction, on January 10, 2013.³

Mr. Gomez did very well on his retained jurisdiction program and received an Addendum to the Presentence Investigation Report (PSI) that recommended probation.

On May 13, 2013, new private counsel substituted into this case as counsel for Gomez in place of the Bannock County Public Defender's Office. The Court set a Rider Review Hearing for May 28, 2013. The new private counsel appeared at that hearing with Gomez and requested a two week continuance. The State did not object so the Court continued the Rider Review Hearing until June 10, 2012. On June 10, 2012, Defendant again asked for a continuance so that he could file several motions. Again, the State did not object to a continuance so the Court continued the matter. Gomez remained incarcerated throughout these continuances.

² Both defense counsel and Gomez were aware at this point that the PSI Report was recommending a retained jurisdiction and that ICE was planning to deport Gomez. The Court believed that Gomez was a flight risk due to these facts, and revoked Gomez's OR release and placed him in jail until sentencing.

³ The Supreme Court has stayed that appeal pending the outcome of Defendant's 2nd Motion to Withdraw Guilty Plea.

On June 12, 2013, Gomez filed another Motion to Withdraw Plea of Guilty (2nd Motion to Withdraw Guilty Plea). This motion, for the first time, suggested that Gomez spoke only limited English and was not informed of the immigration consequences of his guilty plea. However, the new private counsel also filed a Motion for Permission to Withdraw as counsel on June 12, 2013. The Court held a hearing on June 24, 2013, at which defense counsel argued his motion to withdraw as counsel. The State made no objection and the Court granted the motion to withdraw as counsel. A new public defender, Douglas Dykman, outside the Bannock County Public Defender's Office was appointed to represent Gomez.

On July 9, 2013, Mr. Dykman filed a motion to appoint Interpreter and set this motion for hearing. The Court held the hearing on July 15, 2013. Over the State's objection, the Court appointed an interpreter and set the Rider Review Hearing for July 22, 2013. Gomez then set his 2nd Motion to Withdraw Guilty Plea for that same date, July 22, 2013. On July 22, 2013, the Court placed Gomez on probation for a period of 8 years and took the 2nd Motion to Withdraw Guilty Plea under advisement.⁴

DISCUSSION

A motion to withdraw a guilty plea brought after sentencing will be granted only to correct manifest injustice.⁵ If a plea was not taken in compliance with constitutional due process standards, which require that a guilty plea be made voluntarily, knowingly and

⁴ Despite being placed on probation, Gomez remains incarcerated in the Bannock County Jail on an ICE hold.

⁵ ICR 33(c); *State v. Thomas*, 154 Idaho 305, 297 P.3d 268 (Cl.App. 2013).

intelligently, then manifest injustice is established as a matter of law.⁶ However, a prima facie showing of compliance with due process standards is made when the minimum requirements of ICR 11 have been met.⁷ That rule provides that when the trial court accepts a guilty plea, the record of the entire proceedings, including reasonable inferences drawn therefrom, must show that the defendant was informed of the consequences of his plea, and other direct consequences which may apply.⁸

Here, at the change of plea hearing, the parties submitted a written plea agreement signed by Gomez. In that agreement, Gomez acknowledges that he speaks and reads the English language fluently, that he enters his guilty plea voluntarily, and that his counsel has reviewed all aspects of the charge against him including all possible legal defenses.⁹ The Court and Gomez then went through a colloquy in open court regarding the requirements of ICR 11 and in which Gomez acknowledged, among other things, that he reads and understands the English language, that he has no mental disease, illness or disorder, that he waives his constitutional rights by pleading guilty, that he is not a United States citizen, that there is a possibility of deportation due to his guilty plea, and that he has an obligation to register as a sex offender. The Court then required Gomez to complete a Guilty Plea Questionnaire before he left the courtroom. In that questionnaire, Gomez again acknowledged the existence of all requirements of ICR 11, including, that he could read and write the English language and that as a noncitizen he ran the risk of

⁶ *Thomas*, 154 Idaho, at 307.

⁷ *Id.*

⁸ ICR 11(c)(2); *Thomas*, at 307.

⁹ See, Plea Agreement, filed July 23, 2012, p. 4, para. IX.

deportation. At sentencing, Gomez knew that ICE had a deportation hold on him and that even if he received probation he would not be released from jail because of that hold. He is in the States illegally and would be deported even without a crime having been committed. There is a prima facie showing of compliance with due process standards.

Despite all of the above, Gomez now claims that he does not speak English well, he does not read English at all, and he needs an interpreter to help him understand what is being said. He further claims that because of the lack of an interpreter at all stages up until his rider review hearing, he did not understand the risk of deportation.

Gomez has submitted several affidavits or writings to the Court. Some are notarized as being under oath. All appear to be in the same handwriting. All are in fluent English. He appeared in open Court in several hearings and spoke English and properly answered all questions put to him, using complete sentences and not just "yes" or "no" responses. He gave a statement at sentencing without the aid of an interpreter, again using fluent English. There is no indication in the record that he had trouble doing his PSI interview, psychosexual evaluation, or full-disclosure polygraph in English. In fact, the psychologist who performed the psychosexual evaluation noted that Gomez reads English at a "fairly adequate level" and speaks "fairly good English".¹⁰ While on his retained jurisdiction program, Gomez obtained his GED and completed several workforce readiness classes including first aid, fire, ladders/scaffold, lockout, office safety, tool, hazmat and food handlers. He completed a community model program in which he served as the assistant senior coordinator. There is nothing in the APSI to suggest that

¹⁰ Despite this fact, a couple of the tests were performed in Spanish.

Gomez had trouble with the English language while on his Rider.

Courts are constantly called upon to decide, from conflicting evidence, what is fact. That, indeed, is their daily fare. They usually have no firsthand knowledge of what is fact—who really had the green light, whether it was the defendant who actually shot the victim—but, to perform their public role as adjudicator, they are empowered to declare what is fact from the evidence presented to them and to enter judgments based upon those declarations, whether implicit or explicit. Here, the facts are straight forward and many are within the firsthand knowledge of the Court. Gomez speaks and understands English. He reads and writes English. The facts that he proceeded throughout the legal process without an interpreter, he communicated to the Court in word and writing in English, and only belatedly asked the Court for an interpreter demonstrate his ability to comprehend English, both spoken and written. Manifest justice does not require the Court to grant Gomez's motion on the basis of his new claim that he doesn't understand English.

Even if Gomez understands English fluently, there is still the issue of whether he was adequately informed of the risk of deportation. Gomez is not a legal resident. He is no longer married to a U.S. citizen. He has no right to be in this country. He can be deported even in the absence of a felony conviction.¹¹ He pled guilty to sexual battery of a minor child sixteen or seventeen years of age under I.C. § 18-1508A(1)(a). This crime has these elements:

1. A defendant who is at least five years older than the victim;
2. A victim who is 16 or 17 years old;
3. A defendant who intends to arouse, appeal to, or gratify the lust, passion, or

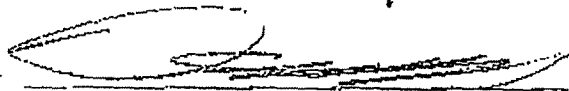
¹¹ 8 USC § 1227.

- sexual desires of themselves, the victim, or a third party;
4. A defendant who:
- a. commits any lewd or lascivious act upon the victim;
 - b. solicits the victim to participate in a sexual act;
 - c. causes or has sexual contact with the victim not amounting to lewd conduct; or
 - d. makes any photographic or electronic recording of the victim.

Gomez did not plead guilty to lewd conduct or to sexual abuse of a child under the age of sixteen. This distinction is important because the Immigration and Nationality Act (INA) shows that Lewd Conduct with a Minor under 16 and sexual abuse of a minor under the age of sixteen is "sexual abuse of a minor" for purposes of that Act and therefore an aggravated felony. An aggravated felony makes deportation presumptively automatic. Any person not a citizen of the United States who is convicted of an aggravated felony must be advised that he will be deported rather than that he simply may be deported. Gomez does not fall within that category because his crime is not an aggravated felony.

There is no question that Gomez was told multiple times that he might be deported. There is no question that he understood English enough to know what he was being told. There is no question that ICE had contacted him before he was sentenced. Gomez knew he risked deportation before sentencing. Even if he didn't, his deportation was going to occur with or without a conviction. The motion to set aside guilty plea is denied.

DATED this 6th day of August, 2013.



DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of August, 2013, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Bannock County Prosecutor

- ☐ U.S. Mail
- ☒ E-Mail
- ☐ Courthouse Box
- ☐ Fax: 236-7288

Kent Reynolds

- ☐ U.S. Mail
- ☒ E-Mail
- ☐ Courthouse Box
- ☐ Fax:

Amy J. Beers
Deputy Clerk